

STATE OF MICHIGAN
COURT OF APPEALS

CURTIS LEE NEWELL,

Plaintiff-Appellant,

v

CHAD LEE ALLEN,¹ BRENT MILES, and
OAKLAND COUNTY

Defendants-Appellees.

UNPUBLISHED

July 2, 2009

No. 285086

Oakland Circuit Court

LC No. 2006-076539-CZ

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

This case arises out of a police officer's misidentification of plaintiff Curtis Newell as a marijuana seller and the resulting raid on plaintiff's home. According to plaintiff's affidavit, on September 26, 2004, his home was raided by masked police officers who broke down his door without warning and after entry beat him, handcuffed him, dragged him down the stairs of his home and pointed guns at his head. Plaintiff developed chest pains and was taken to the hospital where he was kept chained to a bed while being interrogated by a police detective. His affidavit further states that, since the raid, his reputation in his community has suffered and some neighbors shun him. As was later discovered, and as is conceded by the defendants, plaintiff was not a drug seller; there were no drugs or other contraband at his home and he was not involved in any drug-related activity.

Plaintiff brought suit against the two investigating officers, Oakland County Deputy Chad Allen and Oakland County Sgt. Brent Miles as well as their employer, Oakland County. The complaint alleges assault and battery and excessive force, false arrest/imprisonment, negligence, gross negligence and intentional infliction of emotional distress. The trial court dismissed the suit as to all defendants and all claims. We agree that dismissal as to Oakland County and Sgt. Miles was proper and affirm in that regard. We also agree that dismissal of the claims against Deputy Allen was proper except for the counts sounding in false arrest/false imprisonment as

¹ This party's last name is spelled as both "Allan" and "Allen" in the lower court record. We have used the former spelling in this opinion, consistent with the parties' briefs.

there is a question of fact whether Deputy Allen knowingly or recklessly included false information in the affidavit used to obtain the search warrant for plaintiff's home.

We first address the claims that were properly dismissed. Defendant Oakland County asserted the defense of governmental immunity, and neither plaintiff's brief below nor to this Court argues that immunity is inapplicable. Thus, summary disposition as to Oakland County was proper. As to the claims for assault and battery and excessive force, the trial court properly noted in its opinion that the individual defendants were not present at the search or plaintiff's arrest and there is no evidence that they committed an assault or battery or used any force, let alone excessive force, against him. Thus, this claim was properly dismissed under MCR 2.116(C)(10). Finally, we agree that Sgt. Miles is entitled to dismissal of the false arrest/false imprisonment claim as there is no evidence that he either drafted or signed the search warrant affidavit which is the basis for our reversal as to Deputy Allen.

As noted, we reverse as to the false arrest/imprisonment claim against Deputy Allen in light of the evidence creating a question of fact whether he knowingly or recklessly included false information in the affidavit used to obtain a search warrant. For clarity, it should be noted that there are several affidavits in the record. In addition to the affidavit executed by Deputy Allen as the factual basis for the search warrant, both Deputy Allen and Sgt. Miles executed affidavits in support of their motion for summary disposition. The two affidavits attached to the motion for summary disposition will be referred to below as the "litigation affidavits." The affidavit submitted to the magistrate in support of the search warrant request will be referred to below as the "search warrant affidavit."

According to the litigation affidavits, defendant officers, using a confidential informant ("CI"), learned of ongoing marijuana sales by two white males known as Noah and Lucky. Deputy Allen directed the CI to order a quarter pound of marijuana from these men. In Deputy Allen's presence, the CI had two telephone conversations with Lucky during which Lucky agreed to a time and place to deliver the marijuana to the CI. During that conversation, Lucky told the CI that before meeting the CI, Lucky and Noah would be going to a tire store in Pontiac to obtain the marijuana from their supplier who, he explained, was a black male named Brian who drove a black Cadillac. The CI then showed Deputy Allen where the tire store was and told Deputy Allen that this tire store was the location where Noah and Lucky's marijuana supplier stored his marijuana and conducted his transactions. The CI also told Deputy Allen that Noah and Lucky would be driving a white Eagle Talon and after obtaining the marijuana, would place it in the engine compartment of the car.

The litigation affidavits assert that Deputy Allen, Sgt. Miles and other officers set up surveillance around the tire store building. The CI was in Deputy Allen's surveillance vehicle with Deputy Allen. Both Deputy Allen and Sgt. Miles attested that they observed a white Eagle Talon parked at the tire store. Both attested that they saw two white males talking with an African-American male and that shortly thereafter the two white males left in the Eagle Talon and the African-American male left in the Cadillac. The affidavit does not indicate that they witnessed any exchange of money or goods. As the black male drove by Deputy Allen's car, the CI tried to crawl onto the floor of the surveillance vehicle while saying: "Oh god! There he is! He's gonna see me!" which Deputy Allen interpreted as a positive visual identification of the black male in the Cadillac as Lucky and Noah's supplier. Deputy Allen recorded the license plate number of the Cadillac. Other officers followed the Cadillac to plaintiff's residence and a

check of Secretary of State records revealed that he was the owner of the Cadillac. The Eagle Talon was stopped by uniformed officers and Sgt. Miles and they discovered a large bag of marijuana hidden in the engine compartment. According to the litigation affidavits, while executing other search warrants related to this transaction, Deputy Allen and Sgt. Miles both concluded that plaintiff was not a drug dealer and that another man who resembled plaintiff and who also drove a black Cadillac was the actual marijuana dealer. Upon learning of the misidentification, Deputy Allen and Sgt. Miles radioed the officers who were to search plaintiff's home in order to try to call off the raid, but it was too late. By then, the raid had been executed and plaintiff was at the hospital.

Deputy Allen's litigation affidavit concludes by stating that "I was entirely truthful in the Affidavit that I submitted to obtain the Search Warrant for Plaintiff's residence." However, in our view, a reasonable juror could conclude that this is not the case. Indeed, two statements included in the search warrant affidavit are notably absent from the litigation affidavits. First, the search warrant affidavit states that during the tire store surveillance, "the CI was able to identify the black male [plaintiff] as Brian . . . the marihuana supplier of suspects Noah and Lucky." This statement certainly shades the actual events to make them appear more compelling than they were. There is no statement anywhere in any of the litigation affidavits that the CI had ever seen the dealer before or that he knew anymore than that the dealer was a black man in a black Cadillac. Given that plaintiff was a black man in a black Cadillac, it is not surprising that the CI tried to avoid being seen by him. However, this does not tell us that the CI personally recognized plaintiff as the dealer; it tells us only that he, like Deputy Allen, noted that there was a black man in a black Cadillac at the tire store and concluded that this could be the dealer.

If this were the only misstatement in the search warrant affidavit, we would affirm summary disposition. While it would have been better practice for Deputy Allen to have explicitly determined whether the CI could really identify the dealer rather than assume that he could, Deputy Allen's interpretation of the CI's statements and actions were reasonable.

Of greater concern is a second, much more concrete difference between the litigation affidavit and the search warrant affidavit. In the search warrant affidavit, Deputy Allen attests that after Noah and Lucky were arrested, he personally spoke with them and that Noah told Deputy Allen that on the date of the marijuana sale, they had been transported by the dealer in a 2001 Cadillac Seville, license plate number 8FRE12 – which is the same license plate number recorded by Deputy Allen off of plaintiff's car at the tire store and is, in fact, the license plate number on plaintiff's car. This statement does not appear in the litigation affidavit. More important, given that plaintiff was, in fact, innocent of any criminal action and wholly uninvolved with this drug sale, it is difficult to understand why and how Noah obtained plaintiff's license plate number and why, after his arrest, he would have given it to Deputy Allen as the license number of the dealer's car. Given this incongruity between the assertion in the search warrant affidavit and the uncontested reality of plaintiff's innocence, a juror could reasonably conclude that this assertion in the search warrant affidavit was false and that Deputy Allen improperly inserted this claim into the affidavit in order to provide a basis for the magistrate to sign the search warrant. While Deputy Allen may, at trial, offer a satisfactory explanation of these statements in his search warrant affidavit, no such explanation is present in the record before this Court.

Notably, except for the link of the license plate, the affidavit is devoid of any real connection between plaintiff and this drug deal, other than the fact that he was a black man who drives a black Cadillac. No observations were made of anything changing hands between Lucky and Noah and plaintiff, and there is no indication that the three of them left the sight of the surveillance team at any time which might have allowed for a transaction to take place. Lucky and Noah were never seen in plaintiff's car. While there was reason to suspect plaintiff given that he fit the general description of a middle aged African-American male and that he was at the tire store, what elevated that mere suspicion to probable cause was the claim that Noah stated he was transported for the drug deal in a car with plaintiff's precise license number. Deputy Allen's placement of Noah's alleged license plate statement into the affidavit could allow for a reasonable juror to conclude that (a) Deputy Allen was knowingly or at least recklessly including false information into the search warrant affidavit and (b) that Deputy Allen himself doubted that there was sufficient evidence to establish probable cause without this embellishment.

For this reason, we conclude that there is a question of material fact on plaintiff's claim of false arrest as to Deputy Allen. As gravaman of plaintiff's false arrest/false imprisonment² claim, plaintiff alleges that the individual defendants "intentionally or recklessly made false representations to obtain a search warrant of his home." In *Raudabaugh v Baley*, 133 Mich App 242, 248; 350 NW2d 242 (1983), we held that a complaining witness is not immune from a suit for false arrest, even if a warrant is issued, where "the complaining witness did not act reasonably: for example when he knew, or should have known, that, were it not for his mistake, the arrest warrant would not have been issued." In *Raudabaugh*, as here, the defendant was the investigating officer and this Court concluded that "the warrants did not operate to insulate defendants from liability for false arrest, as [defendant officer] personally secured the warrants based on false, unsubstantiated information." *Id.* at 248. Similarly, in *Hollis v Baker*, 45 Mich App 666; 207 NW2d 138 (1973), we reversed dismissal of a suit against a police officer stating:

The shield of personal liability immunity to police officers executing warrants is available only to the extent that said action does not conflict with the logical analysis of the attendant circumstances. The officers are protected only insofar as their execution of the warrant did not fly in the face of their available information. Such protection is afforded to protect the officer in the conscientious discharge of

² False arrest and false imprisonment are separate causes of action, but are generally not distinguished in decisions. See *Moore v Detroit*, 252 Mich App 384, 386-387; 652 NW2d 688 (2002), and authorities cited therein. As explained in *Moore*, "the general concept of false imprisonment as an 'unlawful restraint of an individual's personal liberty' is broader than, but includes, a false arrest involving law enforcement." *Id.* at 387. An action for false imprisonment may be maintained without alleging that an arrest occurred. *Id.* See also *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 17 n 15; 672 NW2d 351 (2003). "The elements of false imprisonment are (1) an act committed with the intention of confining another, (2) the act directly or indirectly results in such confinement, and (3) the person confined is conscious of his confinement." *Walsh v Taylor*, 263 Mich App 618, 627; 689 NW2d 506 (2004) (citation and internal quotation marks omitted).

his duties, but it was never meant to protect an officer from his failure to act as a reasonable man would when faced with similar circumstances. [*Id.* at 670.]

The *Hollis* Court concluded that whether the actions of the officers were reasonable “could only be determined after a full evidentiary hearing” and remanded the case for trial. *Id.*

The question remains what standard should be applied in determining whether Deputy Allen’s actions give rise to an action for false arrest/false imprisonment. Some language from prior cases suggests that such a cause of action arises anytime the affiant acts unreasonably which suggests a negligence standard. *See, e.g. Raudabaugh, supra.* While this standard may be appropriate for non-police complainants or affiants, we do not believe that such a standard reasonably takes into account the exigencies and demands of police work. We conclude that where an officer knowingly or recklessly includes false information in an affidavit in order to obtain a warrant he is liable for false arrest/false imprisonment and the damages that arose out of the issuance and execution of the warrant. In this case, there are questions of material fact under this standard which must be resolved by the trier of fact.³ Accordingly, we reverse the trial court’s dismissal of the false arrest/false imprisonment count as to Deputy Allen and remand this case to the trial court for further proceedings on that count. In all other respects, the trial court’s order of summary disposition is affirmed.

/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro

³ The dissent suggests that we are engaging in “inappropriate fact-finding.” We respectfully suggest that the dissent is confused about the conclusions we reach. We do not conclude that the defendant made false statements in the search warrant affidavit nor that plaintiff is entitled to relief. Rather, we conclude that whether defendant made false statements in the affidavit is a question that requires an answer. We further conclude that it is the factfinder, and not this Court, that must answer that question.